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5 UNITED STATES DISTRICT COURT  
6 WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

7 WILL CO. LTD.,

8 Plaintiff,

9 v.

10 KAM KEUNG FUNG, *et al.*,

11 Defendants.

Cause No. C20-5666RSL

ORDER

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13 This matter comes before the Court on “Defendants’ Memorandum of Law in Support of  
14 Motion to Dismiss for Lack of Personal Jurisdiction.” Dkt. # 23-1.<sup>1</sup> Plaintiff Will Co. Ltd., a  
15 Japanese limited liability company, manages a library of over 50,000 adult entertainment movies  
16 which it offers to the public for viewing for a fee. Defendant Fellow Shine Group Ltd. (“FSG”)  
17 is a British Virgin Islands limited liability company that operates out of Taiwan, and defendant  
18 Kam Keung Fung is a resident of Hong Kong. Plaintiff alleges that defendants jointly own  
19 and/or operate the website Avgle.com, which allows users to upload and view adult videos. Will  
20 Co. discovered that its copyrighted works were being displayed on Avgle.com and filed this  
21 lawsuit seeking injunctive relief, damages, disgorgement of profits, and the costs of suit.  
22 Defendants have moved to dismiss all claims based on a lack of personal jurisdiction.  
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26 <sup>1</sup> Pursuant to LCR 7(b)(1), argument in support of a motion must be submitted as part of the  
27 motion itself, not in a separate document. Defendants’ introductory motion (Dkt. # 23) has not been  
considered.

1 It is Will Co.'s burden to establish that this Court can properly exercise jurisdiction over  
2 defendants' persons. *Mavrix Photo, Inc. v. Brand Techs., Inc.*, 647 F.3d 1218, 1223 (9th Cir.  
3 2011). Because the motion to dismiss will be decided on the written submissions of the parties  
4 rather than an evidentiary hearing, Will Co. need only make a *prima facie* showing of  
5 jurisdictional facts to withstand dismissal. *AMA Multimedia, LLC v. Wanat*, 970 F.3d 1201 (9th  
6 Cir. 2020). This *prima facie* standard "is not toothless." *In re Boon Glob. Ltd.*, 923 F.3d 643,  
7 650 (9th Cir. 2019). While the undisputed allegations of the complaint will be taken as true and  
8 conflicts in affidavits will be resolved in Will Co.'s favor, *Schwarzenegger v. Fred Martin*  
9 *Motor Co.*, 374 F.3d 797, 800 (9th Cir. 2004), disputed allegations cannot establish jurisdiction,  
10 *Boon Glob.*, 923 F.3d at 650. Rather, Will Co. must come forward with evidence in support of  
11 the jurisdictional fact alleged.  
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14 Having reviewed the memoranda, declarations, and exhibits submitted by the parties,<sup>2</sup> the  
15 Court finds as follows:

#### 16 BACKGROUND

17 Defendant FSG hired a Hong Kong company, Awesapp Ltd., to provide general software  
18 development services related to the creation and maintenance of Avgle.com. Defendant Fung is  
19 a director of Awesapp and, working from Hong Kong, performed or oversaw almost every  
20 aspect of the website's development. Awesapp purchased the domain name Avgle.com and  
21 adapted an existing website template and source code to fit the new website's needs.<sup>3</sup> It then  
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24 <sup>2</sup> This matter can be decided on the papers submitted. Defendants' request for oral argument is  
25 DENIED.

26 <sup>3</sup> Mr. Fung states that Awesapp "was hired by FSG to adapt source code from  
27 adultvideascript.com ("AVS") for the needs of Avgle.com" and that he "used the English language  
28 version of the template because it was the only language available." Dkt. # 23-3 at ¶ 7. FSG asserts that

1 took steps to make sure the website was universally accessible. Since its inception, Avgle.com  
2 has been hosted on servers in the Netherlands: all of the files that have been uploaded to and  
3 displayed on the website are stored on origin servers in that country. To increase access speeds,  
4 Awesapp entered into a relationship with Cloudflare, Inc., a U.S. company, to gain access to  
5 Cloudflare's content delivery network ("CDN"). A CDN is a network of servers that are  
6 strategically placed around the globe to bring content physically closer to the user and reduce  
7 delays. The network caches content in edge servers to facilitate transfers, take the load off of  
8 origin servers, and avoid bottlenecks in the network. According to its website, Cloudflare has  
9 servers in over 200 cities around the world, spanning over 100 countries. Awesapp uses  
10 histats.com to track website traffic and obtain visitor analytics.  
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13 In addition to his website development and maintenance tasks, Mr. Fung also oversaw  
14 Avgle.com's advertising program. Under his direction, FSG contracted with Tiger Media, Inc.,  
15 d/b/a JuicyAds, a Canadian advertising broker. FSG makes pop-up space on Avgle.com  
16 available to JuicyAds, which in turn sells that space to companies or individuals wanting to  
17 advertise to Avgle.com users. JuicyAds contracts with the advertisers, negotiating the terms on  
18 which the pop-ups will be seen. FSG is not involved in those negotiations, but it surmises that  
19 some of the advertisers choose to specify the countries in which their advertisements will appear  
20 and/or the type of user at which their advertisements will be targeted. It is unclear whether FSG  
21 is paid a flat fee per advertisement or has a profit-sharing arrangement with JuicyAds, but it has  
22 earned approximately \$300,000 from advertisements placed by JuicyAds. In addition, Avgle.com  
23 provides an avenue for direct advertisement inquiries which has, to date, resulted in two  
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26 it was Mr. Fung who obtained the AVS template and that it contained the references and links to U.S.  
27 law that are found at the bottom of the Avgle.com site. Dkt. # 23-3 at ¶ 31.

1 advertising agreements with Chinese companies.

## 2 DISCUSSION

### 3 A. Specific Jurisdiction Under Fed. R. Civ. P. 4(k)(2)

4 Personal jurisdiction over an out-of-state defendant is proper where permitted by a  
5 long-arm statute and where the exercise of jurisdiction does not violate federal due process.  
6 *Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1154 (9th Cir. 2006). The parties agree that  
7 plaintiff's jurisdictional claim should be evaluated under the federal long-arm statute, Federal  
8 Rule of Civil Procedure 4(k)(2), which authorizes the exercise of personal jurisdiction where  
9 (1) the claim arises under federal law, (2) defendant is not subject to the personal jurisdiction of  
10 any state court, and (3) the court's exercise of jurisdiction over defendant comports with due  
11 process. *Holland Am. Line Inc. v. Wartsila N. Am., Inc.*, 485 F.3d 450, 461 (9th Cir. 2007). At  
12 issue in this case is the third requirement.

13 Due process requires that a defendant who is not present in the forum has "certain  
14 minimum contacts" with the forum "such that the maintenance of the suit does not offend  
15 traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. Wash.*, 326 U.S. 310,  
16 316 (1945) (internal quotation marks omitted). "The due process analysis under Rule 4(k)(2) is  
17 nearly identical to traditional personal jurisdiction analysis with one significant difference: rather  
18 than considering contacts between [defendant] and the forum state, we consider contacts with  
19 the nation as a whole." *Wartsila N. Am.*, 485 F.3d at 462. In the context of a copyright  
20 infringement claim, a defendant will have sufficient "minimum contacts" with the forum to  
21 warrant the exercise of jurisdiction if the defendant "purposefully directed his activities" toward  
22 the United States, the claim "arises out of or relates to the defendant's forum-related activities,"  
23 and "the exercise of jurisdiction must comport with fair play and substantial justice, *i.e.* it must

1 be reasonable.” *AMA Multimedia*, 970 F.3d at 1208 (internal citations omitted). Plaintiff has the  
2 burden of establishing the first two prongs. *Axiom Foods, Inc. v. Acerchem Int’l, Inc.*, 874 F.3d  
3 1064,1068 (9th Cir. 2017).

4         The conduct of which defendants are accused took place entirely outside the United  
5 States. In this context, the analysis focuses on the effects of defendant’s conduct within the  
6 forum and indications of their intent. In particular, “the defendant allegedly must have  
7 (1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the  
8 defendant knows is likely to be suffered in the forum state.” *Mavrix*, 647 F.3d at 1228 (quoting  
9 *Brayton Purcell LLP v. Recordon & Recordon*, 606 F.3d 1124, 1128 (9th Cir. 2010)). For  
10 personal jurisdiction purposes, “a defendant acts intentionally when he acts with ‘an intent to  
11 perform an actual, physical act in the real world, rather than an intent to accomplish a result or  
12 consequence of that act.’” *AMA Multimedia*, 970 F.3d at 1209 (quoting *Schwarzenegger*, 374  
13 F.3d at 806). FSG acknowledges that its ownership and operation of the Avgle.com website is a  
14 jurisdictionally sufficient “intentional act.” Dkt. # 23-1 at 12. Mr. Fung argues, however, that  
15 because he is neither the owner nor the operator of Avgle.com, he has not engaged in a  
16 comparable intentional act that would support the exercise of jurisdiction over him. The Court  
17 disagrees. Mr. Fung personally performed or oversaw almost every aspect of Avgle.com’s  
18 development, including purchasing the domain name, adapting a template and source code to  
19 create the website, and taking steps to ensure that the website was universally accessible. That he  
20 was acting in his capacity as a director of Awesapp does not change the fact that he acted with  
21 an intent to perform the real, physical acts that gave rise to Avgle.com. Mr. Fung’s actions were  
22 intentional acts which satisfy this first prong.

23         The next issue is whether FSG and/or Mr. Fung “expressly aimed” their intentional acts at  
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28 ORDER - 5

1 the United States. Simply knowing that harm might be inflicted on a plaintiff in the United States  
2 does not, in and of itself, establish the express aiming element. Rather, the focus of the analysis  
3 is “on defendant’s intentional conduct that is aimed at, and creates the necessary contacts with,  
4 the forum state.” *AMA Multitmedia*, 970 F.3d at 1209 n. 5 (citing *Axiom Foods, Inc. v. Acerchem*  
5 *Int’l, Inc.*, 874 F.3d 1064, 1068-69 (9th Cir. 2017), and *Walden v. Fiore*, 571 U.S. 277, 286  
6 (2014)). Plaintiff contends that FSG and Mr. Fung are subject to specific jurisdiction in the  
7 United States because they expressly aimed tortious conduct at the forum by: (1) maintaining a  
8 globally-accessible website that appeals to and profits from an audience in the U.S.; (2) targeting  
9 advertisements based on the user’s presence in the United States; (3) engaging a CDN service to  
10 enable the faster and more efficient display of Avgle.com content to viewers in the United  
11 States; (4) actively managing the Cloudflare account using United States IP addresses; and  
12 (5) representing that the site complied with U.S. law, in particular the Digital Millennium  
13 Copyright Act (“DMCA”) and 18 U.S.C. § 2257.  
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16 The Ninth Circuit has noted the difficulty of determining “whether tortious conduct on a  
17 nationally accessible website is expressly aimed at any, or all, of the forums in which the website  
18 can be viewed.” *Mavrix*, 647 F.3d at 1229. Merely operating a universally accessible website  
19 does not, standing alone, satisfy the express aiming prong: there must be “something more,”  
20 namely conduct targeting the relevant forum, to constitute express aiming. *Rio Props., Inc. v. Rio*  
21 *Int’l Interlink*, 284 F.3d 1007, 1020 (9th Cir. 2002).  
22

23 In *Mavrix*, the Ninth Circuit found that a website’s operators had expressly aimed at the  
24 forum where the universally accessible website “appeals to, and profits from, an audience in a  
25 particular state.” 647 F.3d at 1231. *Mavrix* was a Florida company in the business of selling  
26 photos of celebrities who had connections with California. The defendant, Brand Technologies,  
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1 was an Ohio corporation that operated the website celebrity-gossip.net. Mavrix alleged that  
2 Brand uploaded thirty-five of Mavrix' copyrighted photos to celebrity-gossip.net. Mavrix filed a  
3 copyright infringement lawsuit in the Central District of California, which Brand moved to  
4 dismiss on the ground that it was subject to jurisdiction only where the two parties resided. The  
5 court found that Brand had done "something more" than simply operate a website that happened  
6 to be accessible in California. Brand had:

- 8       ● hired a California firm to maintain the website;
- 9       ● hired a California company to solicit advertisers for celebrity-gossip.net;
- 10      ● hired a California wireless provider to design and host a mobile phone version of the  
11       website;
- 12      ● contracted with a California-based national news site to promote each other's top  
13       stories; and
- 14      ● profited from third-party advertisements for jobs, hotels, and vacations in California.

15 Most importantly, Brand's website had "a specific focus on the California-centered celebrity and  
16 entertainment industries." 647 F.3d at 1230. It continuously and deliberately exploited the  
17 California market for commercial gain through content that was of special interest to  
18 Californians and paid advertisements directed to Californians. There was also evidence that  
19 Brand knew that its user base was centered in California. "Based on the website's subject matter,  
20 as well as the size and commercial value of the California market, [the Ninth Circuit concluded]  
21 that Brand anticipated, desired, and achieved a substantial California viewer base . . . [that was]  
22 an integral component of Brand's business model and profitability." *Id.* In those circumstances,  
23 "it does not violate due process to hold Brand answerable in a California court for the contents  
24 of a website whose economic value turns, in significant measure, on its appeal to Californians.  
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27 *Id.*

1 Plaintiff relies heavily on *Mavrix* to argue that FSG and Mr. Fung expressly aimed their  
2 intentional acts at the United States. There are, however, significant distinctions between the  
3 conduct of Brand and that of defendants. Avgle.com was designed, maintained, and hosted  
4 outside the United States. Although it is universally accessible and defendants track visitor  
5 analytics, those analytics show that the United States makes up approximately 6-8% of  
6 Avgle.com traffic. Japan, on the other hand, is far and away the most significant customer of  
7 what Avgle.com is selling at over 40% of the viewer base. Whereas Brand hired an advertising  
8 broker located in California, defendants hired a Canadian company to sell advertising space on  
9 Avgle.com. Plaintiffs have not provided any information regarding the comparative percentages  
10 of advertisements placed by U.S. companies versus companies from other countries, the  
11 percentage of U.S. goods, services, or experiences sold, or the percentage of advertising revenue  
12 associated with U.S. consumers. The only intentional act that was arguably centered on the U.S.  
13 is the hiring of Cloudflare, a U.S. company tasked with bringing Avgle.com content to users  
14 more quickly through a global network of servers. Plaintiff hypothesizes that defendants engaged  
15 Cloudflare to better serve U.S. customers and argues that the relationship is proof of express  
16 aiming. Cloudflare's services are global, however, speeding content delivery to users around the  
17 world. There is no evidence that defendants chose Cloudflare in order to focus on the United  
18 States, nor is there any evidence that they have influenced - or even had the ability to influence -  
19 the location of the CDN servers Cloudflare utilizes to perform its assigned tasks.

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21 This case is more analogous to *AMA Multimedia* than *Marvix*. The foreign defendant in  
22 *AMA Multimedia*, Marcin Wanat, was the Polish operator of an adult video website which, like  
23 Avgle.com, allowed users to upload content, did not charge users to access the site, used a third-  
24 party advertising broker to place advertisements on the sites and generate revenue, and gave  
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1 advertisers the option to target their ads based on the user's perceived location. Unlike  
2 Avgle.com, the website in *AMA Multimedia* was registered through a U.S. company, over 19%  
3 of its visitors were from the U.S., and the U.S. was its largest market. The Ninth Circuit rejected  
4 AMA Multimedia's argument that Wanat expressly aimed the website at the U.S. market. The  
5 Ninth Circuit noted that, unlike the facts in *Marvix*, the subject matter of Manat's adult video  
6 website was not of special interest to or otherwise focused on the United States market. Rather,  
7 the website lacked "a forum-specific focus" in that "the market for adult content is global." *AMA*  
8 *Multimedia*, 970 F.3d at 1210. The same can be said here. Plaintiff offers no evidence regarding  
9 the percentage of U.S.-produced or -uploaded content found on Avgle.com. Even if such  
10 evidence existed, the Ninth Circuit has found that where website "content is primarily uploaded  
11 by its users, . . . the popularity or volume of U.S.-generated adult content does not show that  
12 [defendant] expressly aimed the site at the U.S. market." *Id.* (citing *Walden*, 571 U.S. at 284  
13 ("[T]he relationship must arise out of contacts that the defendant himself creates with the forum  
14 State.")). Nor would the foreseeability of U.S.-based users, standing alone, support a finding of  
15 express aiming. *Id.* at 1210-11 (citing *Walden*, 571 U.S. at 289) (rejecting the Ninth Circuit's  
16 conclusion that a defendant's knowledge of a plaintiff's strong forum connections plus  
17 foreseeable harm in the forum comprises sufficient minimum contacts)).

18 *AMA Multimedia* expressly rejected plaintiff's contention that geotargeted advertising  
19 established express aiming. Tailoring advertisements based on the perceived location of the user  
20 simply means that the advertisements are directed at every forum in which users can be found: it  
21 does not establish that the website was expressly aimed at any particular forum. Plaintiff asserts  
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1 that geotargeted ads are not seen in every country, but, even if true,<sup>4</sup> there is no indication that  
2 defendants had any input on whether JuicyAds offered geotargeting to its clients or which  
3 advertisers chose that option. Absent some evidence that defendants insisted that geotargeting be  
4 offered to U.S. advertisers or otherwise created incentives that favored such services in this  
5 forum, third-party conduct that targets advertising toward certain users does not establish that  
6 defendants expressly aimed their conduct at the U.S.

8 The same analysis applies to plaintiff's contention that the use of a CDN shows express  
9 aiming at the United States. To the contrary, Cloudflare's network of servers speeds delivery of  
10 content to users everywhere through the use of servers placed closer to the viewer than the origin  
11 server in the Netherlands. A viewer in the United States would enjoy faster download speeds via  
12 U.S.-based servers while content for a viewer in Japan would be delivered via servers in Asia.  
13 There is no evidence that defendants control the servers used to deliver content to Avgle.com  
14 users. Absent some indicia that defendants chose a Cloudflare package that focused on the  
15 United States or otherwise directed its server resources toward the forum, the use of a CDN does  
16 not establish that Avgle.com was tailored to exploit the U.S. market or otherwise expressly  
17 aimed at the forum.<sup>5</sup>

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20 Plaintiff's last argument - that the inclusion of references to U.S. law on its website  
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22 <sup>4</sup> Plaintiff's survey of advertisements shown in France, Taiwan, Australia, Canada, Germany, and  
23 the U.S. revealed geotargeted ads only in the U.S. Plaintiff's choice of "test" countries is unexplained,  
24 however, and ignores the largest Avgle.com user (Japan at 48.7%). Of the countries who make up the  
25 top ten users of Avgle.com, plaintiff surveyed only three of them. Plaintiff has failed to raise a plausible  
26 inference that advertisements are targeted only at U.S. users.

27 <sup>5</sup> Plaintiff's contention that defendants engaged with Cloudflare hundreds of times to manage its  
28 account has been largely debunked. With regards to the few log-ins that may be attributable to Mr. Fung,  
29 plaintiff has not shown how managing an account with a service provider constitutes express aiming at  
30 the United States, especially where the services at issue are global in nature.

1 establishes express aiming - also fails. It is undisputed that defendants knew Avgle.com would  
2 be accessible in the United States and that it was foreseeable that it would have users in the U.S.  
3 who uploaded content to the website. Announcing the legal standards and duties governing any  
4 such use reflects the expected reality but does not, in the context presented here, reveal a focus  
5 on the forum. Regardless, defendants have provided evidence that these references are mere  
6 artifacts, part of the English-language template Mr. Fung modified to create Avgle.com. Based  
7 on the current record, the references to the DMCA and 2257 do not establish express aiming.  
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9 Plaintiff has not shown that the United States was “the focal point” of Avgle.com or  
10 defendants’ conduct in creating and maintaining the site. *Walden*, 571 U.S. at 287 (quoting  
11 *Calder v. Jones*, 465 U.S. 783, 789 (1984)). It has not, therefore, shown express aiming or  
12 purposeful direction, and the Court lacks jurisdiction over defendants’ persons.  
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#### 14 **B. Jurisdictional Discovery**

15 Plaintiff requests that, if a more satisfactory showing of jurisdictional facts is necessary, it  
16 be permitted to conduct discovery related to issues of jurisdiction. Plaintiff’s claim of personal  
17 jurisdiction over FSG and Mr. Fung is not attenuated: it is entirely possible that the U.S. market  
18 for adult videos guided the development of Avgle.com and its revenue structure. At present, the  
19 evidence reveals a worldwide or Asian focus, but additional discovery regarding, inter alia, the  
20 business plan for defendants’ foray into on-line adult entertainment, the circumstances under  
21 which an English language website with prominent reference to U.S. law was chosen as a  
22 template, how and why that template was edited, the terms under which Cloudflare provides  
23 CDN services, the nature of the arrangement with JuicyAds and/or the advertisers it procures,  
24 and the percentage of U.S.-based content and revenues could materially alter the analysis.  
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26 Plaintiff will, therefore, be given an opportunity to take jurisdictional discovery from defendants.  
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1 For all of the foregoing reasons, defendants' motion to dismiss for lack of personal  
2 jurisdiction (Dkt. # 23-1) is taken under advisement. Plaintiff shall have ninety days in which to  
3 conduct jurisdictional discovery and file an amended response to the motion to dismiss. The  
4 motion to dismiss will be renoted for the second Friday after the response is filed. If no amended  
5 response is filed within ninety days, the motion to dismiss will be granted. Defendants may file  
6 an amended reply on or before the note date.  
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9 Dated this 19th day of July, 2021.

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11 Robert S. Lasnik  
12 United States District Judge  
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